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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

MICHAEL THOMAS ROSE,

Petitioner,

v.

THE SUPREME COURT OF
THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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January 15, 1986

QUESTIONS PRESENTED

1. Was petitioner denied due process of law when the Colorado Supreme Court refused to correct its erroneous rejection of his application for admission to the bar, where that rejection was the outcome of a proceeding in which petitioner was affirmatively misled about the nature of the charges against him and deprived of an opportunity to rebut those charges, and in which a judge who was disqualified from participating in fact secretly urged his colleagues to deny the application, and where petitioner suffers continuing harm therefrom?

2. Did the Colorado Supreme Court deprive petitioner of his rights under the First Amendment when it permanently barred him from discussing the circumstances un-

derlying his denial of admission to the bar, even though misleading and derogatory information about those circumstances has been publicized by others, including the Chief Justice of this Court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	(i)
TABLE OF AUTHORITIES.....	(v)
OPINIONS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	4
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	25
I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FAILURE OF THE COLORADO SUPREME COURT TO APPLY STANDARDS OF DUE PROCESS TO THE PROCEEDINGS REGARDING ROSE'S ADMISSION TO THE COLORADO BAR, AND TO HIS PETITION FOR RELIEF.....	28

TABLE OF CONTENTS (Continued)

		Page
II.	CERTIORARI SHOULD BE GRANTED BECAUSE THE SPECIAL MASTER'S ORDER AND THE OCTOBER 27, 1982, LETTER FROM THE COLORADO SUPREME COURT WHICH AFFIRMS IT ARE DIRECT, PRIOR RESTRAINTS UPON ROSE'S SPEECH, UNJUSTIFIED BY ANY CLEAR AND IMPENDING DANGER OR COMPETING GOVERNMENTAL INTEREST AND THEREFORE REPUGNANT TO THE CONSTITUTION.....	53
CONCLUSION.....		64

Table of Authorities

Cases	Page
Bernard v. Gulf Oil Company, 619 F.2d 459 (5th Cir. 1980), aff'd. on other grounds, 452 U.S. 89 (1981)	56,57, 58,59, 62,63
Board of Regents v. Roth, 408 U.S. 564 (1972)	26,29 30
Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175 (1968)	63
CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975)	63
Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970)	62
Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) cert. denied, 427 U.S. 912 (1976)	58,59
Codd v. Velger, 429 U.S. 624 (1977)	26,29 30
Craig v. Harney, 331 U.S. 367 (1947)	61,62

Cases	Page
Department of the Air Force v. Rose, 425 U.S. 352 (1976).....	7
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).....	3,4
Doe v. U.S. Department of Justice, 753 F.2d 1092 (D.C. Cir. 1985)...	26,29
Grayned v. City of Rockford, 408 U.S. 104 (1972).....	64
Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).....	59
In re Icardi, 436 Pa. 364, 260 A.2d 782 (1970).....	44,45
In re Mattox v. The Disciplinary Panel of the United States District Court, 758 F.2d 1362 (10th Cir. 1985).....	32,45
In re Monaghan, 126 Vt. 53, 222 A.2d 665 (1966).....	35
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)...	59,60
Near v. Minnesota, 283 U.S. 697 (1931).....	56,57
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).....	60

Cases	Page
In re Admission of Rose, 50 U.S.L.W. 3714 (March 9, 1982)	2,5,6, 21,26
Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984)	61,63 64
Shelton v. Tucker, 364 U.S. 479 (1960)	63
Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)	59
U.S. v. Columbia Broadcasting System, Inc., 497 F.2d 102 (5th Cir. 1974)	61
Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	64
Waldo v. Lakeshore Estates, 433 F.Supp. 782 (E.D. La. 1977)	59
Walker v. Birmingham, 388 U.S. 307 (1967)	59
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963)	25,26, 31,32, 42,43, 44,45 50

Cases	Page
Wood v. Georgia, 370 U.S. 375 (1962)	61,62

Constitutional Provisions and Statutes	
U.S. CONST. amend I	4
U.S. CONST. amend V	4
U.S. CONST. amend XIV, § 1	4,29
28 U.S.C. § 1257(3) (1970)	3,4
Colo. R. Civ. P. 201	4,47, 55,56, 62
Colo. R. Civ. P. 201-220 and 222-225 (repealed December 1, 1982 and reenacted as Rule 201)	2,9, 20,33 47,55, 56,57

Other	
M. Rose, A Prayer for Relief: The Constitutional Infirmities of the Military Academies' Conduct, Honor and Ethics System (1973)	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. _____

MICHAEL T. ROSE,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner Michael T. Rose ("Rose") respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado, entered on October 17, 1985, which denied Rose's Petition for Relief.

OPINIONS BELOW

The 1976 Report of the Bar Committee Pursuant to Colo. R. Civ. P. Rule 212, recommending that Rose be denied admission to the Colorado Bar, is reproduced as Appendix C at 6a and is unreported. The 1977 Order of the Colorado Supreme Court, denying Rose Admission to the Colorado Bar, is reproduced as Appendix D at 14d and is unreported. The 1981 Master's Report, in which the Special Master recommended that Rose be admitted to the Colorado Bar is reproduced as Appendix E at 14a and is unreported. This Court's decision in In re Admission of Rose, 50 U.S.L.W. 3714 (March 9, 1982), is reproduced as Appendix S at 161a. The letter from David W. Brezina, Clerk of the Colorado Supreme Court (October 27, 1982), in which that court refused to rescind the rules and orders of confidentiality, is reproduced as Appendix B at 3a and is

unreported. The 1985 Order of the Colorado Supreme Court, denying in whole Rose's Petition for Relief (in which both the Due Process and the First Amendment arguments were first presented) is reproduced as Appendix A at 1a and is unreported.

JURISDICTION

The Order of the Colorado Supreme Court, denying Rose's Petition for Relief, was entered on October 17, 1985. (The Colorado Supreme Court has advised us that the exact time of entry of the order is unknown.) This Court has exclusive jurisdiction to review that Order pursuant to 28 U.S.C. § 1257(3) (1970). District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution is reproduced as Appendix DD at 286a. The Fifth Amendment to the United States Constitution is reproduced as Appendix Y at 245a. Section 1 of the Fourteenth Amendment to the United States Constitution is reproduced as Appendix Z at 246a. 28 U.S.C. § 1257(3) (1970) is reproduced as Appendix AA at 247a. Colo. R. Civ. P. 201 is reproduced as Appendix BB at 248a.

STATEMENT OF THE CASE

1. Summary. The United States Supreme Court has exclusive jurisdiction to review a final judicial decision of the highest court of a state in a case involving a particular applicant's admission to a state bar. Feldman, 460 U.S. 462 (1983).

The Colorado Supreme Court denied petitioner Michael T. Rose due process of law when it rejected his application for admission to the Colorado Bar in 1977 and when it rejected his petition for Relief in 1985. This rejection, and the erroneous findings upon which it was based, have caused and continue to cause Rose serious and irreparable injury to his personal and professional reputations. Certiorari should be granted to review the procedure by which the Colorado Supreme Court rejected Rose's application, and its refusal to correct the erroneous results of that Constitutional deprivation.

Rose's injuries are exacerbated by the Chief Justice's published dissent in In re Admission of Rose, 50 U.S.L.W. 3714. That dissent, which severely impugned Rose's character, was based upon the substantively erroneous and procedurally defective findings of the Colorado Supreme

Court. In a separate opinion, Justice Stevens warned that an applicant might well suffer "serious harm" as the result of an "ad hoc, ex parte evaluation of [his] character" conducted in the absence of a fair hearing. Id. (Stevens, J., concurring). Those words were prescient, for, as this petition shows, not only the Chief Justice's dissent but the Colorado Supreme Court's initial denial of admission were largely ex parte, were factually erroneous, and have caused petitioner considerable harm.

Rose is prohibited from commenting on the Colorado proceedings, and on the facts underlying the Chief Justice's dissent, by rulings of the Colorado Supreme Court. These rulings serve as a direct, prior and unconstitutional restraint upon Rose. Certiorari also should be granted to remedy this constitutional infraction and to

allow Rose to respond publicly to personal attacks upon his character.

Rose, a graduate of the United States Air Force Academy, has spent a considerable portion of his career attempting to redress legal infirmities in the adjudicatory systems of the military academies. He wrote a controversial book that questioned the administration of the academies' conduct, honor and ethics systems. M. Rose, A Prayer for Relief: The Constitutional Infirmities of the Military Academies' Conduct, Honor and Ethics Systems (1973). He has aired his criticisms on Sixty Minutes and other television programs. In addition, he prevailed in a seminal Freedom of Information Act lawsuit against the Air Force. Department of the Air Force v. Rose, 425 U.S. 352 (1976).

Rose believes that his criticism of the military academies prompted the Colorado proceedings. If Rose had been given

due process before he was denied admission, he would have been able to prove this.

As long as the adverse and unconstitutional Colorado findings stand, Rose cannot freely practice law, engage in business transactions, apply for a job, enter politics, make meaningful public statements or associate with individuals afraid of the stigma attached to him. By granting certiorari and reviewing the Colorado Supreme Court's actions, this injustice may be partially rectified and Rose can proceed with his life and his work.

2. Facts. In December, 1975, Rose applied for admission to the Colorado Bar. On December 3, 1976, the Bar Committee of the Colorado State Board of Law Examiners ("Committee") voted to recommend to the Colorado Supreme Court that Rose's application be rejected. Letter from Barnard

Houtchens to the Colorado Supreme Court (December 6, 1976), [hereinafter cited as "Houtchens's Letter"] at 32a (Appendix G). By report dated December 27, 1976, the Committee transmitted its findings and recommendation to the Colorado Supreme Court. Report of the Bar Committee Pursuant to C.R.C.P. Rule 212 [hereinafter cited as "Committee Report"] (Appendix C) at 6a. On January 6, 1977, the Colorado Supreme Court denied Rose admission. Order, In the Matter of the Application of Michael Thomas Rose for Admission to the Colorado Bar (January 6, 1977) (Appendix D) at 14a.

The Colorado Supreme Court violated fundamental principles of due process when it denied Rose admission to the Colorado Bar. It did not notify Rose -- either orally or in writing -- of the charges upon which his admission was denied until after his application was rejected. Even

more critically, the Committee falsely informed Rose that it was not considering particular charges which it later used as grounds to deny him admission. Reporter's Transcript of April 30, 1976, Hearing, at 82a [hereinafter cited as "April 30 Transcript"] (Appendix H); Reporter's Transcript of June 4, 1976, Hearing, at 99a [hereinafter cited as "June 4 Transcript"] (Appendix I). Indeed, on numerous occasions during the hearings, the Committee members themselves were confused as to the nature of the charges against Rose. April 30 Transcript at 75a, 82a (Appendix H).

On December 3, 1976, six members of the Committee voted five to one to deny Rose admission. Houtchens's Letter at 33a

(Appendix G). Before the vote, "hearings" 1/ in which Rose participated were held on April 30, 1976, and June 4, 1976. April 30 Transcript (Appendix H) at at 34a; June 4 Transcript (Appendix I) at 88a. Of the five Committee members who voted against Rose, one member did not attend either hearing and two other members did not attend the June 4, 1976, hearing. Compare April 30 Transcript at 34a (Appendix H), and June 4 Transcript (Appendix I) at 88a, with Houtchens's Letter at 32a (Appendix G). These committee members could not have reviewed transcripts of the testimony they had missed, including Rose's testimony, because the

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[1]Committee members variously characterized these "hearings" as an "interview," April 30 Transcript (Appendix H) at 87a, and as a "meeting." June 4 Transcript (Appendix I) at 89a.

transcripts were not prepared until after Rose was denied admission. Houtchens's Letter at 33a (Appendix G). Nevertheless, these three members voted to reject Rose's application.

The Committee did not disclose to Rose critical evidence used against him; this denied Rose the right to confront and rebut this evidence. The Committee also never produced, and never gave Rose the opportunity to confront, those individuals upon whose accusations the Colorado Supreme Court denied him admission; this denied Rose the right to confront and cross-examine his accusers.

In recommending to the Colorado Supreme Court that Rose be denied admission, the Committee stated that it had relied, among other sources, upon a letter dated September 24, 1976, from Richard F. Hennessey to the Colorado Board of Law Examiners [hereinafter cited as the "Hennessey

Report"] (Appendix J) at 109a and the report of Committee member, Roger Cisneros, Committee Report at 7a (Appendix C). Report by Roger Cisneros to Bar Committee (Appendix K) at 125a. Cisneros had attended both hearings, had investigated Rose for the Committee, and had recommended to the Committee -- and had voted -- that Rose be admitted to the Bar. Id. at 126a (Appendix K).

The Hennessey Report, in contrast, was issued on September 24, 1976, over three months after the last hearing. Although Hennessey interviewed numerous individuals who had a motive to malign Rose, he never interviewed Rose or any one of a number of people who would speak on his behalf. Based on this one-sided investigation, Hennessey concluded that Rose was guilty of misconduct; yet Rose was never charged with the misconduct that Hennessey alleged. Moreover, the

individuals Hennessey interviewed were never produced for confrontation or cross-examination by the Committee or by Rose. Rose never had an opportunity to confront and rebut their statements. He did not know that the Hennessey Report existed -- he did not know that Hennessey was even investigating him -- until after his application was rejected. Notwithstanding these due process inadequacies, after Rose was denied admission, Colorado Supreme Court Justice Groves informed Rose that the Hennessey Report was "what sank" him. Affidavit of Michael T. Rose, ¶3 [hereinafter cited as "Rose Affidavit"] (Appendix L) at 127a.[2]/

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[2] The Rose Affidavit and all other material relied upon here were filed with the Colorado Supreme Court as attachments to Rose's Petition for Relief.

Justice Groves formally disqualified himself from voting on Rose's application because he had served as liaison between the Committee and the Colorado Supreme Court, and in this capacity had heard numerous ex parte allegations against Rose and had had ex parte communications about Rose with Air Force officials. Nevertheless, in two "Personal and Confidential" memoranda, Justice Groves urged the other Justices of the Colorado Supreme Court to deny Rose admission. Memoranda from Justice Groves to the Colorado Supreme Court (December 8, 1976, and January 5, 1977) (Appendix M) at 133a. There is no telling what effect Justice Groves' improper ex parte communications had on the court.

Justice Groves also circulated confidential information about the Colorado proceedings to Rose's adversaries. For example, he provided a United States Congressman with "more [information about

Rose] than we generally disclose without the permission of the applicant." Letter from Justice Groves to Congressman Wilson (October 26, 1977) (Appendix CC) at 284a. Although Justice Groves requested that the Congressman "treat [the information] as rather privileged," Justice Groves himself kept a "mailing list" on which he offered to place Congressman Wilson and an unknown number of other persons, and to whom he sent information about "the future of . . . Rose." Id. at 284a.

On October 27, 1978, Rose applied for admission to this Court's Bar. The then Clerk, Michael Rodak, Jr., requested the Colorado Supreme Court to provide this Court with information about Rose. Letter from Michael Rodak, Jr. to Justice Groves (January 22, 1979) [hereinafter cited as "Rodak's letter"] (Appendix N) at 135a. Rodak's letter closed with this assurance: "Any such information will be . . . held

in the strictest confidence." (Emphasis supplied).

Justice Groves forwarded Rodak's letter to Rose and asked him to authorize the Colorado Supreme Court to release his file to this Court. Letter from Justice Groves to Rose (March 5, 1979) [hereinafter cited as "Groves letter"] (Appendix O) at 138a. Rose, relying upon Rodak's written assurance of confidentiality, consented.

Justice Groves supplied the United States Supreme Court with only information which damaged Rose; he purposely excluded the numerous letters and affidavits favorable to him. Letter from Justice Groves to Michael Rodak, Jr. (April 17, 1979) (Appendix P) at 141a. On November 27, 1978, this Court informed Rose that his application would be held in abeyance pending action on his reapplication to the Colorado Bar. Letter from Michael Rodak,

Jr. to Rose (November 27, 1978). (Appendix Q) at 150a.

On December 1, 1978, Rose reapplied for admission to the Colorado Bar. In approximately May, 1979, a Disciplinary Prosecutor was appointed to investigate Rose, new allegations were made against him, and a second Disciplinary Prosecutor was appointed to prosecute those allegations.

The new allegations against Rose were based largely upon an extensive, secret, ex parte file of information and allegations provided to the Disciplinary Prosecutor by Justice Groves. Affidavit of Jordon Hochstadt and Richard Strauss, ¶¶6-7 [hereinafter cited as "Hochstadt and Strauss Affidavit"] (Appendix R) at 152a. A Special Master, who was appointed by the Colorado Supreme Court to hear the allegations, denied Rose's request to be supplied a copy of this file. The Special

Master stated that Justice Groves had directed him to deny the request. Id. at ¶¶8-10 (Appendix R). Thus, Rose was required to defend himself without the benefit of the file used against him by the Disciplinary Prosecutor.

In January, 1980, Rose requested that the Colorado proceedings remain confidential so that the unproven factual allegations made there could not be used against him in unrelated proceedings. 3/ Hochstadt and Strauss Affidavit ¶¶11-12 (Appendix R) at 157a. The Special Master granted Rose's request on January 21, 1980. Order No. 2 of Special Master [hereinafter cited as "Special Master's Order"] (Appendix F) at 30a. The Order read, in pertinent part:

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[3]This concern was warranted. The Special Master found these new allegations

(Footnote Continued)

. . . I find and order that:

> a. Rule 216, C.R.C.P., is applicable to these proceedings, except that such disclosures as may be reasonably necessary in order to prepare for hearing, are allowed.
>
> * * *
>
> c. Parties and counsel will conduct themselves accordingly.

Colo. R. Civ. P. 216 (repealed effective December 1, 1982), which was in effect when Rose re-applied to the Colorado bar, provided that "all such information [relating to the applicant's ethical or moral qualifications] shall be held confidential by the Committee and the Court unless in the opinion of the Court its disclosure becomes necessary in a hearing on the application" [emphasis added].

(Footnote Continued)
to be groundless. Master's Report (Appendix E).

A hearing on Rose's reapplication was held on February 16, 17 and 18, 1981. On May 8, 1981, the Special Master concluded that Rose was morally and ethically qualified to practice law and recommended that he be admitted to the Colorado Bar. Master's Report (Appendix E) at 14a. The Special Master expressly ruled that it was not within his jurisdiction to consider the Committee's original findings and recommendation. Id. at 16a. On May 22, 1981, Rose was admitted.

Rose next petitioned this Court to reconsider his application. In a seven to two vote, this Court approved Rose's admission to the bar on March 8, 1982. However, the information which Rose released to this Court -- and which he had been assured would be "held in the strictest confidence" -- was published by the Chief Justice in his dissent to the majority opinion. In re Admission of Rose, 50

U.S.L.W. 3714. The Chief Justice's dissent was reported in the Washington Post, the New York Times, the National Law Journal, the Denver Post, and other publications (Appendix T) at 167a. Additionally, if the name "Michael T. Rose" is searched in LEXIS, the dissent will be retrieved.

The widespread dissemination of the Chief Justice's dissent -- and the misleading and confidential information it contained -- have caused Rose serious professional damage. Because of the Chief Justice's dissent and the Colorado proceedings on which it was premised, Rose has been denied jobs and has lost clients, Rose Affidavit, ¶4 (Appendix L) at 127a, Affidavit of Col. Donald C. Odegard, Jr. (Appendix U) at 198a; his personal relationships and his professional reputation have been severely damaged, Rose Affidavit, ¶4 (Appendix L); his applications

to the Bars of two states have been stalled indefinitely, Id., ¶4-F at 131a; and he faces the prospect of confronting the Chief Justice's dissent anew -- and in silence -- in virtually every case in which he is involved. See, e.g., Respondents' Memorandum in Opposition to Michael T. Rose's Motion for "Partial Summary Judgment" (Appendix V) at 206a; Rose Affidavit (Appendix L) at 126a.

As long as the Special Master's Order remains in effect, Rose cannot respond to the charges in the Chief Justice's dissent; nor can he fully answer the questions which the media ask him concerning the subject. Seeking to unloose these restraints, Rose filed in the Colorado Supreme Court a Motion to Withdraw Rules and Orders of Confidentiality. Motion to Withdraw Rules and Orders of Confidentiality, In re the Application of Michael T. Rose for Admission to the Bar of the State

of Colorado (October 18, 1982) (Appendix W) at 235a. On October 27, 1982, the Colorado Supreme Court advised Rose that he could comment publicly only on the documents which Justice Groves had forwarded to this Court. As to all other documents and matters -- including the letters and documents which were favorable to Rose -- the Court refused to "grant permission to waive the rules and orders of confidentiality." Letter from David W. Brezina, Clerk of the Colorado Supreme Court, to Rose (October 27, 1982) (Appendix B) at 4a. As Brezina's letter makes clear, the Colorado Supreme Court interpreted the Special Master's Order to apply to Rose as forcefully as it applied to the court and counsel. The Colorado Supreme Court's refusal to rescind these rulings was reiterated on October 17, 1985, when that court denied Rose's Petition for Relief. Order of Court, In

re the Application of Michael T. Rose for Admission to the Bar of the State of Colorado (October 17, 1985) (Appendix A) at 1a.

REASONS FOR GRANTING THE WRIT

This case raises important issues regarding admissions proceedings to state bars. The first involves the due process requirements of such proceedings. This Court has held that a state may not deny an applicant admission to its bar on grounds of poor moral character without first affording the applicant due process under the Fifth and Fourteenth Amendments to the United States Constitution. Willner v. Committee on Character and Fitness, 373 U.S. 96, 102-05 (1963). Willner stands for the proposition that the right to confront, rebut, and cross-examine is central to the notion of due process; however, this Court has never since applied Willner's precepts to the factual

setting from which they arose -- state bar admissions proceedings. Moreover, in In re Admission of Rose, 50 U.S.L.W. 3714, the Chief Justice premised his dissent on factually incorrect state court findings based on proceedings which violated procedural due process. Certiorari should be granted to review, in light of Willner, the procedures the Colorado Supreme Court employed in 1977 to deny Rose admission to the state bar.

This Court has also held that when the government takes action that stigmatizes an individual, the Due Process Clause minimally entitles the individual to an opportunity to clear his or her name. Board of Regents v. Roth, 408 U.S. 564, 573 & n.12 (1972); Codd v. Velger, 429 U.S. 624, 627 (1977); Doe v. U.S. Department of Justice, 753 F.2d 1092, 1102-03 (D.C. Cir. 1985). Certiorari should be granted to review the Colorado

Supreme Court's refusal to provide such an opportunity to petitioner.

The final issue is of immediate concern to Rose. Rulings of the Colorado Supreme Court prohibit him from publicly commenting on his case. This is a direct, prior and unconstitutional restraint upon Rose. Individuals who disagree with Rose continually use the Colorado proceedings to question his credibility. For example, on March 16, 1985, Senator Barry Goldwater, a member of the Air Force Academy Board of Visitors, characterized Rose as one "who went to law school and who was not admitted to the Colorado Bar on his initial try. . . ." Affidavit of Robert C. Moore, ¶4. (Appendix X) at 242a. Moreover, the Public Information Office at the United States Air Force Academy has disseminated information about the Colorado proceedings to the media in a deliberate attempt to undermine Rose's

integrity. Id. at ¶5. The rulings of the Colorado Supreme Court prohibit Rose from responding to these attacks. Whether or not one agrees with Rose's views, he is still entitled to present them. Certiorari should be granted to review these rulings and return to Rose his First Amendment rights.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FAILURE OF THE COLORADO SUPREME COURT TO APPLY STANDARDS OF DUE PROCESS TO THE PROCEEDINGS REGARDING ROSE'S ADMISSION TO THE COLORADO BAR, AND TO HIS PETITION FOR RELIEF.

1. Rose was denied due process when the Colorado Supreme Court rejected his petition to clear his name.

When an individual claims that his reputation has been unfairly besmirched by governmental action, "the remedy mandated by the Due Process Clause of the

Fourteenth Amendment is 'an opportunity to refute the charge.' [Board of Regents v. Roth,] 408 U.S. [564], at 573. 'The purpose of such notice and hearing is to provide the person an opportunity to clear his name,' id., at 573 n.12." Codd v. Velger, 429 U.S. 624, 627 (1977). See also Doe v. U.S. Department of Justice, 753 F.2d 1092, 1102-03 (D.C. Cir. 1985).

As is demonstrated in this petition, the Colorado Supreme Court unfairly and inaccurately stigmatized Rose when it denied his application for admission to the state bar in 1977. After Rose became fully aware of the circumstances of those 1977 proceedings, and of the continuing injury to his reputation that was occurring despite his later admission to the state bar -- particularly because of the publication of false and damaging information from those proceedings in the Chief Justice's dissent -- he petitioned the

Colorado Supreme Court for name-clearing relief. That court summarily denied his petition, without any statement of reasons. In re the Application of Michael T. Rose for Admission to the Bar of the State of Colorado (Appendix A) at 1a. The Due Process Clause required that Rose's Petition for Relief be granted, at least to the extent of providing him with the "name-clearing hearing" contemplated by Roth and Codd.

2. Rose was denied due process because he was not informed, until after his application was rejected, of the charges against him and upon which he was to be denied admission. In fact, the Committee affirmatively misled Rose about these charges.

A state must notify an applicant of the specific charges against him and upon which it proposes to deny the applicant

admission. Willner, 373 U.S. at 105. The applicant must be notified before a final decision is made, so he has a meaningful opportunity to refute the specific charges. Id.

In Willner, this Court held that mere notification of the general matters under consideration, as opposed to notification of the specific charges, does not constitute due process:

> There seems no question but that petitioner was apprised of the matters the Committee was considering. 'But a "full hearing" -- a fair and open hearing -- requires more than that. . . . Those who are brought into contest with . . . Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' [Citation omitted]. Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, '[t]he requirements of fairness are not

> exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.' [Citations omitted].

Willner, 373 U.S. at 105 (emphasis added). See also In re Mattox v. The Disciplinary Panel of the United States District Court, 758 F.2d 1362 (10th Cir. 1985). The Colorado Supreme Court failed to provide Rose with the process that was due. Only after Rose was denied admission was he notified of the grounds upon which his application was rejected. He was never given an opportunity to refute those grounds.

In recommending that Rose's application be rejected, the Committee concluded that Rose had:

> Engaged in a pattern of conduct evidencing: [1] irresponsibility in professional matters in that he was suspended from the Bar of Pennsylvania, for a period of over two years, for his failure to comply with the Pennsylvania Supreme Court's attorney registration rule and misrepresenting his status in this

> regard on his application to the Bar of Colorado; [2] continued lack of candor in business and professional matters concerning his not being a member of the Bar of Colorado; [3] continued violation of reasonable rules of conduct in his capacity as a law clerk and in work on legal matters in his association with a Colorado law firm. Such conduct is inconsistent with the standards set forth in C.R.C.P. Rule 212.

Committee Report at 12a (Appendix C). In its Findings, the Committee also raised "the impropriety of . . . a solicitation" of business by Rose. Id. at 11a.

As its first ground for recommending that Rose be denied admission, the Committee concluded that he was suspended from the Pennsylvania Bar for failing to renew his annual registration. Committee Report at 7a, 12a (Appendix C). The Committee further found that Rose had misrepresented this fact on his application to the Colorado Bar. Id.

Rose was never notified that the Committee was considering matters related to the Pennsylvania Bar. Not one word was stated during either hearing about this issue. To this day it is a mystery as to how and when this issue was raised. If Rose had been informed that this was a charge, he would have shown that he had never lived or practiced law in Pennsylvania; was unaware that he was required annually to complete a registration form; was unaware of his suspension and believed, and had no reason to disbelieve, that he was a member in good standing of the Pennsylvania Bar; and was reinstated immediately from his temporary suspension merely by submitting a completed form, without paying any fee. Rose Affidavit,

¶5 (Appendix L) at 132a. 4/ Because Rose was given no opportunity to respond, the Committee concluded that he was guilty of misrepresentation.

The Committee's findings and conclusion on the Pennsylvania Bar issue illustrate the injustice that results when due process is denied. E.g., In re Monaghan, 126 Vt. 53, 222 A.2d 665 at 670 (1966) ("Where any fact or evidence adverse to an applicant is uncovered, he cannot be denied sufficient knowledge of what it is and an opportunity to rebut or explain it.").

The Committee also concluded that Rose had violated reasonable rules of

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[4]Rose took the Pennsylvania Bar exam while stationed at McGuire Air Force Base, New Jersey. He took this exam to qualify as an Air Force legal officer, which required that Rose be a member of any state bar.

conduct as a law clerk for a Denver law firm. Committee Report at 13a (Appendix C). Once again, Rose was not notified until after his application was rejected that he might be denied admission based upon this charge. In fact, Rose was misled into believing that this was not a charge. This prevented him from presenting evidence rebutting it.

The hearing transcripts prove that Rose was led to believe that any dispute he had with the Denver law firm would not be considered a basis for denying him admission. During the hearing, Cisneros stated:

> Well, . . . unless other members of the Committee think differently, the things that have occurred since the hearing last time, to me, are relevant to the issue at hand. You know, there appears to be some controversy, but I think it should be handled some other way by some other committee, other than this one.

June 4 Transcript at 99a (emphasis added) (Appendix I). The colloquy continued:

> ROSE: . . . Now, if you consider it irrelevant, then, that is just fine with me, but I was afraid that you might not consider it irrelevant. . . .
>
> [Committee Member] KRAMER: Well, I think, from my point, so much of this . . . is a dispute between . . . lawyers, is not significant to our responsibility, unless it does involve some actual indication of a lack of integrity or dishonesty.

Id. at 100a. Later in the hearing, Kramer responded to one suggestion that Rose had acted improperly at his law firm:

> [Committee Member] KRAMER: Let's knock that off, because, Glenn, we are talking about hearsay, for one thing, and any recriminations between Rose and Mr. Snider are no business of ours. We don't care about it.

Id. at 105a (emphasis added).

These transcripts show that Rose was not notified that he might be denied admission because of alleged misconduct as a law clerk. In fact, the transcripts prove

otherwise -- that Rose was led to believe that this issue was not the basis for a charge. Nevertheless, in violation of due process, Rose was denied admission on this ground.

The Committee also suggested that Rose may have improperly solicited legal business. Committee Report at 11a (Appendix C). However, Committee member Barnard Houtchens specifically had informed Rose that this was not a charge against him. April 30 Transcript at 82a (Appendix H). Once again, this charge surfaced after the hearings, denying Rose an opportunity to rebut it.

The transcripts show that Rose was not notified of the charges against him. They prove that the Committee members themselves were unsure of the nature of the charges. The following excerpts manifest this confusion.

[Committee Member] HILL: I don't feel sufficiently advised as to the complaint here to be sure that I know what is covered. Apparently one is holding himself out as an attorney. Is there . . . [another for] soliciting business? What are they? If you'd tell me just, if you can, briefly the charges here that we're considering.

* * *

ROSE: I don't believe, sir, that those letters really indicate what the charges are.

[Committee Member] CISNEROS: I think maybe you have a copy of a letter from Justice Groves dated April 22nd, 1976, which is addressed to Rose and the essential part of it, the reason it says for his requested appearance is that 'The Bar Committee is further investigating your ethical and moral qualifications for admission to the Bar in light of your letter to the Bar' which is the letter we quoted, and of Captain Michael R. Watts Affidavit dated June 6, 1975.

[Committee Member] HILL: Then the charges here . . . relates to holding himself out as a lawyer in this letter, but he admitted he was practicing law in Colorado by that letter and that he apparently acted as counsel in some case for a serviceman.

> [Committee Member] CISNEROS: I don't think this has anything to do with practicing law because I think you don't have to be a lawyer to --
>
> [Committee Member] HILL: I wondered about that.

April 30 Transcript at 75a (Appendix H).

The following colloquy transpired later in the hearing:

> [Committee Member] MR. HILL: Is there some charge here of soliciting business too? Is that one of the inferences?
>
> * * *
>
> [Committee Member] HOUTCHENS: You might have inferred it, but there isn't any charge like that.
>
> [Committee Member] HILL: So the real question that we're to decide is do we think that there was a representation that he was a practicing lawyer and was admitted to practice in Colorado?
>
> [Committee Member] HOUTCHENS: Unauthorized practice of law.
>
> [Committee Member] CISNEROS: Right.

> [Committee Member] HILL: He engaged in unauthorized practice of law in Colorado?
>
> [Committee Member] CISNEROS: This is my thought.
>
> [Committee Member] HILL: Is that the issue?
>
> [Committee Member] HOUTCHENS: Of course, the issue is whether or not, if he actually was, then does that result in his being unfit to practice law in Colorado . . . and what would we recommend with respect to his admission to the Court.
>
> [Committee Member] HILL: All right.

Id. at 82a (emphasis added).

Thus, Rose was never informed of any of the charges against him upon which the Committee denied his application. To the contrary, Rose was misinformed of the charges.

In sum, the failure to inform Rose, until after his application was rejected, of the specific charges against him and upon which he was to be denied admission,

violated due process. Willner, 373 U.S. at 105.

3. Rose was denied the fair hearing required by due process.

Rose was entitled to a fair hearing to rebut the specific charges against him. Willner, 373 U.S. at 105.

Rose was denied this right in several respects. For example, a majority of the Committee members who voted to reject Rose's application failed to hear or to review all of the evidence, including some or all of Rose's testimony. Compare April 30 Transcript (Appendix H) at 34a and June 4 Transcript (Appendix I) at 88a with "Houtchens's Letter" (Appendix G) at 32a. Indeed, one such member failed to hear or review any testimony at all, including any of Rose's testimony. Under these circumstances, to assert that the full hearing requirement of due process was satisfied merely because two

"hearings" were held elevates form over substance and makes a mockery of this essential constitutional guarantee.

Rose was denied a fair hearing in other respects. He was entitled to confront and cross-examine his accusers, including the authors of the ex parte statements and documents upon which the Committee based its recommendation that his application be rejected. Willner, 373 U.S. at 105-106. It directly follows from the right of confrontation and cross-examination that an applicant may not be denied admission based on ex parte evidence. Willner, 373 U.S. at 105-106. Due process precludes the use of such evidence because the tribunal cannot judge the credibility and demeanor of their authors; the applicant cannot confront and cross-examine them; nor can the applicant review and rebut the contents of their statements and documents.

In concluding that due process barred the use of ex parte evidence to deny an applicant admission, this Court has held that where a state "did in fact rely on [ex parte evidence], at least to some extent, in reaching its determinations." Willner, 373 U.S. at 106 (emphasis added), its decision must be reversed. Id.

The constitutional shortcomings of the use of ex parte evidence to deny Rose admission would not have been rectified even if Rose had been given an opportunity at the two hearings "to rebut the general import of the accusations contained in . . . [the] ex parte statements and documents." In re Icardi, 436 Pa. 364, 260 A.2d 782 at 784 (1970). As the Pennsylvania Supreme Court has stated:

> An examination of the records of the hearings . . . makes it perfectly clear that those bodies relied, as did the Committee in Willner, on ex parte statements and documents gathered in their investigations.

> It is true that . . . [the applicant] had ample opportunity to offer evidence, which he did, to rebut the general import of the accusations contained in those ex parte statements and documents. He was never, however, given the opportunity of confronting and cross-examining the authors or makers of the various documents and statements which the Boards concluded overcame the prima facie evidence of good moral character presented by him. That failure deprived . . . [the applicant] of the procedural due process to which he was entitled and requires a reversal in order that his application may be considered in the light of the standards mandated by Willner.

Id. (emphasis added). See also In re Mattox, supra, 758 F.2d 1362.

Here, likewise, the Committee received various ex parte complaints against Rose. For example, Captain Michael R. Watts, United States Air Force, alleged in an affidavit that Rose gave him the "impression" that he was an attorney engaging in the unauthorized practice of law. Hennessey Report at 112a (Appendix J).

Also, Lieutenant Colonel Wayne E. Robinson, United States Air Force, alleged in an April 26, 1976, letter to the Committee that Rose was holding himself out as a Colorado attorney. Id.

These examples of ex parte documents are critical for at least two reasons. First, the Committee concluded that Rose continually lacked candor in representing his status as a member of the Colorado Bar. Committee Report at 13a (Appendix C). Second, officers of the United States Air Force had been in an adversarial relationship with Rose and had ample incentive to malign him. The Committee was required to produce Captain Watts, Lieutenant Colonel Robinson, and the authors of the other ex parte complaints,

and to permit Rose to confront and to cross-examine them. It did not do so. 5/

The Hennessey Report was the most damaging of the ex parte documents. The Committee expressly relied upon it in concluding that Rose should be denied admission. Committee Report at 7a (Appendix C).

Incredibly, Hennessey interviewed only individuals who had a motive to malign Rose. (Appendix J) at 109a. He never interviewed Rose or any of the people who would speak on his behalf. Because Hennessey's investigation was covert, neither the Committee nor Rose was

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[5] Colo. R. Civ. P. 201-220 and 222-225, which were in effect when Rose was denied admission, did not provide expressly for the use of subpoena power to require the attendance of complaining witnesses. Colo. R. Civ. P. 201.10 (effective December 1, 1982) now expressly grants the Bar Committee this power.

given the opportunity to confront or cross-examine the witnesses whose testimony convinced Hennessey that Rose was guilty.

Rose was never charged with, nor was he given an opportunity to rebut, the accusations of misconduct which the Hennessey Report made against him. For example, the Report accused Rose of improperly soliciting legal business. Hennessey Report at 123a (Appendix J). As discussed above, the Committee previously had informed Rose that this was not a charge against him. April 30 Transcript at 82a (Appendix H). The Hennessey Report raised other new charges, including a complaint against Rose received on July 29, 1976, after both hearings had ended. Hennessey Report at 109a (Appendix J).

To make matters worse, the Hennessey Report was issued on September 24, 1976, over three months after the last hearing.

Rose did not know that Hennessey was investigating him; he was never confronted with the Hennessey Report; nor was he ever given an opportunity to rebut its devastating and apparently dispositive conclusions.

Colorado's reliance on the Hennessey Report was antithetical to every fundamental notion of due process. Nevertheless, after Rose was denied admission, Justice Groves informed him that the Hennessey Report was "what sank" him. Rose Affidavit at ¶3 (Appendix L) at 127a.

Apparently, Justice Groves was correct. The Hennessey Report had great impact on the Committee. On both September 24, 1976, and December 3, 1976, the Committee met with Hennessey and discussed his report "at length." Houtchens's Letter at 33a (Appendix G). Rose did not attend these meetings; he was not invited to them; he was not even informed that

they would be held. He therefore could not address the new issues which that report raised.

Yet, although Rose was not there to speak on his own behalf, the Committee members who were absent from the April 30 or June 4 hearings did attend one or both of the meetings with Hennessey. Id. at 32a. Thus, the three members who had not heard Rose's full testimony heard Hennessey's unchallenged accusations against him. These three members voted against Rose. Not only was this pattern of ex parte proceedings patently unfair, it denied Rose due process. E.g. Willner, 373 U.S. at 105-06.

4. The late Justice James K. Groves, who was disqualified from voting on Mr. Rose's application, nevertheless urged the Colorado Supreme Court to reject his application.

Justice Groves was disqualified from voting on Rose's application because he served as the "liaison between the [Colorado Supreme Court] and the Bar Committee". Memorandum from Justice Groves to the Colorado Supreme Court (December 8, 1976) (Appendix M) at 133a. As liaison, Justice Groves had reviewed, ex parte, numerous derogatory documents about Rose, and had heard, ex parte, numerous damaging hearsay allegations against him. Id. Nevertheless, he may have improperly prejudiced the Colorado Supreme Court before it voted to deny Rose admission.

Justice Groves urged his colleagues on the Court to reject Rose's application. "For whatever, if anything, my dis-

qualified recommendation may mean, I think that we should adopt the majority recommendation of the . . . Committee." Id. (emphasis added). The Colorado Supreme Court may have attached significant weight to Justice Groves' "disqualified recommendation," Id., because he was in charge of all Colorado bar admissions and disbarment matters.

Justice Groves acknowledged the conflict inherent in acting as liaison between the Committee and the Colorado Supreme Court and subsequently voting on Rose's application. Yet, despite this very real conflict, Justice Groves lobbied his colleagues on the Colorado Supreme Court to deny Rose admission. This further tainted the decision-making process.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE SPECIAL MASTER'S ORDER AND THE OCTOBER 27, 1982, LETTER FROM THE COLORADO SUPREME COURT WHICH AFFIRMS IT ARE DIRECT, PRIOR RESTRAINTS UPON ROSE'S SPEECH, UNJUSTIFIED BY ANY CLEAR AND IMPENDING DANGER OR COMPETING GOVERNMENTAL INTEREST AND THEREFORE REPUGNANT TO THE CONSTITUTION.

Having denied Rose an opportunity to address, within court, the charges made against him, the Colorado Supreme Court now denies Rose the right to rebut these false charges in the court of public opinion.

Two points require emphasis. First, little, if anything, about the reasons for rejecting Rose's application remains confidential. What does remain confidential is the evidence favorable to Rose and the

unfair manner in which he was treated. Despite this Court's written assurance of confidentiality, the allegations against Rose which were developed in the Colorado proceedings have been widely disseminated. The Chief Justice's dissent, which repeats those allegations, is accessible to anyone who searches "Michael T. Rose" in LEXIS. In addition, Colorado Supreme Court Justice Groves maintained a "mailing list" of people to whom he sent information about Rose. Letter from Justice Groves to Congressman Wilson (October 26, 1977) (Appendix CC) at 284a. To United States Congressman Charles H. Wilson, Justice Groves sent "more [information about Rose] than we generally disclose without the permission of the applicant." Id.

Second, Rose is in an untenable position. The Colorado Supreme Court's rules and orders of confidentiality did not prevent information adverse to him from

being circulated. Nevertheless, these same rules and orders prevent him from responding to inquiries resulting from the publication of the damaging information. This is patently unfair, especially because these rules and orders exist to protect, rather than harm, the applicant. In fact, Colo. R. Civ. P. 201.10(c) now provides that the hearing "shall be public unless the applicant shall request that the hearing be confidential." Indeed, the Special Master's Order was issued only at Rose's request and for Rose's protection. Hochstadt and Strauss Affidavit, at 157a (Appendix R).

The rulings which prohibit Rose from commenting on the Colorado proceedings are a direct, prior restraint on Rose. Although, by its terms, Colo. R. Civ. P. 216, which these rulings incorporate, requires only that the court and counsel keep these proceedings confidential, the

Special Master's Order and the October 27, 1982, letter from the Colorado Supreme Court which affirmed that Order extend this rule to apply to Rose. 6/ (Appendices F at 30a and B at 3a). The Fifth Circuit, in Bernard v. Gulf Oil Company, 619 F.2d 459 (5th Cir. 1980), aff'd on other grounds, 452 U.S. 89 (1981), listed four distinct features of a prior restraint. The orders which muzzle Rose exhibit these features in terms as stark, or even more stark, than were before that court.

First, "a prior restraint is generally judicial rather than legislative in origin," 619 F.2d at 467, citing Near v. Minnesota, 283 U.S. 697 (1931). Here, the

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[6]Colo. R. Civ. P. Rules 201 through 220 and Rules 222 through 225 were repealed and were reenacted as Rule 201 by the Colorado Supreme Court November 10, 1982, effective December 1, 1982.

Special Master's Order is undeniably judicial in origin.

Second, "[i]t has been suggested that the sole purpose of a prior restraint is suppression rather than punishment," 619 F.2d at 468. The Bernard ccurt observed that criminal statutes provide for punishment by their terms; a prior restraint "'provides for no punishment, except in case of contempt for violation of the court's order.'" Id., citing Near, 283 U.S. at 715. Such is the case here. The Special Master's Order, the October 27, 1982, letter from the Colorado Supreme Court refusing to rescind that Order, and Colo. R. Civ. P. 216 all restrain communication without explicitly providing for punishment. (Appendices F at 30a and B at 3a).

Third, "'punishment by contempt is an important attribute of a prior restraint. . . .,'" 619 F.2d at 468, citing

Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248 (7th Cir. 1975) cert. denied, 427 U.S. 912 (1976). A contempt order, the Bernard court reasoned, "is both more swiftly imposed and less subject to the criminal safeguards of the criminal justice system than is the punishment for violation of a statute." (citations omitted) 619 F.2d at 468. Here, the text of the Special Master's Order, and that of the Rule upon which the Order is based, are silent as to punishment. Undoubtedly, one available means of enforcement is the court's contempt power and, undoubtedly, it is that threat of contempt which silences Rose.

Finally, the means for challenging a prior restraint are much narrower than those of challenging a criminal statute:

> While the unconstitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded

> from raising its constitutional invalidity as a defense in contempt proceedings.

619 F.2d 469, citing Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) and Walker v. Birmingham, 388 U.S. 307 (1967). Some courts regard this requirement as the lynchpin of prior restraint. See, e.g., Hirschkop v. Snead, 594 F.2d 356, 368 (4th Cir. 1979); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 248; Waldo v. Lakeshore Estates, 433 F.Supp. 782, 788 (E.D. La. 1977).

This requirement is met here. The Special Master's Order is a judicial order which must be obeyed even as it is appealed. As a prior restraint, it has "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, a prior restraint 'freezes' it, at least for a time." Nebraska Press Association v. Stuart, 427

U.S. 539, 559 (1976). Alexander Bickel's words apply with redoubled force to Rose's case: "Prior restraints fall on speech with a brutality and finality all their own. Even if they are ultimately lifted they cause irremedial loss -- a loss in the immediacy, the impact of a speech." A. Bickel, The Morality of Consent 61 (1975), quoted in Nebraska Press, 427 U.S. at 609.

Over three years have passed since the Chief Justice published his dissent; Rose's full response to that dissent -- should he ever be allowed to make it -- will now have neither the impact nor the immediacy that it once might have had.

A prior restraint is not per se unconstitutional, but it comes before this Court "with a 'heavy presumption' against its constitutional validity." E.g. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). To justify

imposition of a prior restraint, the activity restrained must pose a clear and present danger, or a serious or imminent threat to a protected competing interest. Wood v. Georgia, 370 U.S. 375 (1962), and Craig v. Harney, 331 U.S. 367 (1947); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).

> [B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable: it must immediately imperil.

U.S. v. Columbia Broadcasting System, Inc., 497 F.2d 102, 104 (5th Cir. 1974).

The record before this Court is silent as to any danger -- or even any reasonable likelihood of danger -- posed by lifting the Special Master's Order. Perhaps this is because the damage has already been done. Nothing remains of the confidentiality which was to protect Rose;

the only confidentiality which survives now gags him. Nor can it be said that lifting the Special Master's Order threatens a competing governmental interest: that there is no such interest is evidenced by Colo. R. Civ. P. 201.10(c), which now provides that the hearing "shall be confidential unless the applicant shall request that the hearing be public."

Indeed, the very silence of the record argues against the constitutionality of the Special Master's Order:

> Before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice'.

Chase v. Robson, 435 F.2d 1059, 1061 (7th Cir. 1970) (citing Craig v. Harney, 331 U.S. 367, 373); Bernard, 619 F.2d 459, 477; Wood v. Georgia, 370 U.S. 375, 387.

The Special Master's Order falls short of constitutionality in other ways. First, it is not narrowly drawn. Seattle Times v. Rhinehart, 467 U.S. 20; Carroll v. President & Commissioners of Princess Anne, 393 U.S. 175, 183 (1968); Shelton v. Tucker, 364 U.S. 479, 488 (1960); CBS Inc. v. Young, 522 F.2d 234, 238 (6th Cir. 1975); Bernard, 619 F.2d 459, 476. To the contrary, it is so sweeping that it persists even now, more than eight years since Rose was denied admission, and more than four years since he was granted admission, to the Colorado Bar. Without action by this Court, the Special Master's Order will never be lifted.

Second, the Special Master's Order, and the subsequent Colorado Supreme Court Orders affirming it, are vague and overbroad. They are premised on mere references, and references to references, and, finally, on words as imprecise as

"ethical" and "moral". Such amorphous orders cannot stand constitutional scrutiny. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972).

Third, neither the Special Master nor the Colorado Supreme Court considered any less intrusive alternatives to the Special Master's Order. Seattle Times v. Rhinehart, 467 U.S. 20; Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980). To the contrary, by their actions, they have made the Special Master's Order even more intrusive: They have permitted the release of information critical of Rose only to prohibit Rose from responding to it.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment

of the Colorado Supreme Court.

Respectfully submitted,

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